

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Case submitted for
hearing*

77-1272

To be argued by
ALVIN A. SCHALL

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1272

UNITED STATES OF AMERICA,

Appellee,

—against—

CELEDONIA MORALES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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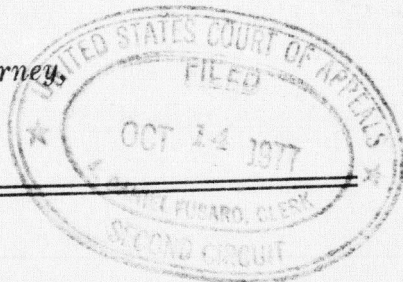


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Docket No. 77-1272

UNITED STATES OF AMERICA,

Appellee,

—against—

CELEDONIA MORALES,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Celedonia Morales appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) entered on May 20, 1977, convicting her, after a jury trial, of a single count of possession of heroin on February 25, 1977, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Morales was sentenced, pursuant to 18 U.S.C. § 4205(b)(2), to a term of 12 years imprisonment and a special parole term of 10 years. She is free on bail pending this appeal.

On appeal, Morales makes three claims: *first*, that she was denied a fair trial by the court's instructions on the fabrication of a document and on conscious avoidance of knowledge; *second*, that she was deprived of the effective assistance of counsel; and *third*, that she was sentenced on the basis of "material false assumptions."

Statement of Facts

The evidence in this two day trial was presented by stipulation and through the testimony of Special Agent Gerard Whitmore of the Drug Enforcement Administration ("DEA") and Philip Lawry of the United States Customs Service ("Customs"). It revealed the following.

At approximately 8:20 on the morning of February 25, 1977, Morales appeared at the American Airlines ticket counter at O'Hare International Airport in Chicago. She was accompanied by a man (84-86).¹ While Morales stood in front of the counter, the man stepped forward and told Ticket Agent Deborah Carvatta that he wished to purchase a one-way coach ticket to New York. After Ms. Carvatta had booked a seat on the 9:00 A.M. flight to LaGuardia Airport, she asked the man the name of the passenger. Indicating Morales, the man stated that the ticket was for his wife, whose name he gave as "Carmen Ortiz." (86).

Ms. Carvatta then asked the man how he would be paying for the ticket, and he replied, "in cash." He then handed over \$81.00, and Ms. Carvatta proceeded to take Morales' suitcase, which had no name on it, and to place on it a LaGuardia tag bearing the flight number and also a tag with the name "Carmen Ortiz" on it (86).

In accordance with airline policy in situations where a one-way ticket is paid for in cash and where there is baggage, Ms. Carvatta next asked the man for proof of identification (83, 87-88). In response, he said that his wife had no identification and asked if he could, as her

¹ Unless otherwise indicated, references are to pages of the trial transcript. References preceded by the letter "H" are to pages of the transcript of the pre-trial suppression hearing of April 5, 1977. References preceded by the letter "S" are to pages of the transcript of Morales' sentencing on May 20, 1977.

husband, present his own. When Ms. Carvatta agreed, the man displayed a Social Security card bearing the last name "Rinaldo," remarking that the difference between his last name and that of his wife could be explained by the fact that they were newly-weds (88). Morales then headed towards the boarding area for the New York flight, and her suitcase was placed on the conveyor belt behind the ticket counter to be carried to the aircraft (88).

While the suitcase was en route from the ticket counter to the aircraft, however, the tag bearing the LaGuardia designation and the flight number somehow became dislodged. As a result, the bag was directed to the American Airlines lost luggage area. There, it was examined by Baggage Service Representative Sherry Lynn Grey (59-60, 67). Seeing a name on the suitcase, Ms. Grey immediately paged "Carmen Ortiz" to return to the American Airlines Passenger Service Office so that arrangements could be made to have the bag placed on the proper flight (68). Ten minutes later, when there was no response to the page, Ms. Grey, using a master key, opened the bag to try and determine from its contents the destination of the passenger to whom the bag apparently belonged (65-71). Inside the suitcase, Ms. Grey at first found nothing but dirty clothing. Then, suddenly, after digging down "a little deeper," she came upon a package seven or eight inches long and three to four inches wide and wrapped in electrician's tape (73). The inside of the package felt "like little rocks," and Ms. Grey replaced it, realizing that it would provide no clue to the identity of the owner of the suitcase (73). Seconds later, though, on the opposite side of the bag, she came upon a similar package, with a rip in it, which gave off a strong vinegar-like odor (73-74).

Her suspicions now aroused, Ms. Grey called the DEA office in Chicago and informed the agent on duty of her

discovery (75-76). Shortly thereafter, Agent Anthony Lobosco arrived at the lost luggage area and performed a chemical field test on the substance from the "Ortiz" suitcase. The test revealed the "little rocks" to be heroin (102-103).²

After small samples of the narcotics were removed from the packages, the packages were placed back in the suitcase. The suitcase was then put on a flight for LaGuardia, it already having been determined through a passenger check that "Carmen Ortiz" was bound for New York (102-103, 107). Simultaneously, arrangements were made by the DEA to apprehend the person who claimed the bag at LaGuardia (104-105, 107).

Meanwhile, Morales had arrived at LaGuardia well ahead of her delayed suitcase. When the bag failed to appear with the rest of the passenger luggage on her flight, she proceeded to the American Airlines claims office at the terminal. There, she was observed by DEA Agent Thomas Sharkey. Posing as an airline employee, Sharkey saw Morales report the loss of her suitcase to an American agent who filled in a lost baggage report with information provided by Morales (109-110, Gov. Ex. 3). Sharkey also "assisted" Morales by "arranging" to have her bag in Chicago placed on a flight arriving in New York at 2:50 that afternoon (104).

While waiting for the arrival of her bag, Morales had lunch and made several telephone calls (111). Then, at approximately 3:00, she went to the baggage claim area and picked up her suitcase from the carousel, where it had been placed by Agent Sharkey. After retrieving her bag, she made several more phone calls and then pro-

² Subsequent laboratory tests confirmed that Morales' suitcase contained approximately two pounds of heroin (123-127).

ceeded to exit the terminal with the narcotics, at which point she was arrested by DEA Agent Gerard Whitmore and the suitcase with the heroin was seized (112). Recovered from Morales at the time of her arrest were the stub of her American Airlines ticket and a copy of the lost baggage report, both in the name of "Carmen Ortiz," together with the cover of a matchbook and a slip of tan paper. The matchbook cover had the address "2230 fulton" (sic) written on it, while the piece of paper bore, on one side, the word "shori" and the telephone number 435-1262 and, on the other side, the notation "1405-36" and "J. Rosario," with the address 1405-36th Street, Brooklyn (113-115, 117-120, Gov. Ex. 4, 5, 6).

Following her arrest, Morales was immediately transported to the DEA field office at Kennedy Airport, where she was given her *Miranda* warnings in Spanish by Customs Officer Philip Lawry (127, 200). She then proceeded to give the agents a bizarre and unbelievable explanation for the events of the past 12 hours. Morales stated that a man whom she only knew from the neighborhood as "Juan" or "El Chiquito" had come to her apartment in Chicago that morning and had offered her \$1,000 to take a suitcase to New York. When Morales agreed, the man gave her the bag and took her to the airport. Morales related that she had been instructed to take the bag to an apartment at 2230 Fulton Street in Brooklyn and that "Juan" had said to use the name "Ortiz." (130-131, 212). She also said that she thought the bag contained just clothing and that she had no idea there was narcotics in it (202-205, 231). When questioned further about the Brooklyn address to which she was to deliver the suitcase, Morales told the agents that if they wanted to "get the persons responsible," they "would have to do it immediately." (133).

Armed with this information, the agents took Morales to the vicinity of 2230 Fulton Street in Brooklyn, where

she was left off in the street with her suitcase in front of an apartment building (133-134). Moments later, surveilling agents observed a blonde haired woman, later identified as Anna Mendez, lean out of a window of the building and converse with Morales (134). Shortly thereafter, Mendez exited the building, walked over to Morales, talked to her, then picked up the suitcase and reentered the building, with Morales following (134-135).

The agents immediately followed the two women into the building and up the stairs to the third floor to Mendez' apartment. When admitted into the apartment by Mendez, the agents found Morales sitting on a chair with the suitcase in front of her. After she had been temporarily taken from the apartment to the landing just outside the door, Morales told the agents that in the street outside Mendez had told her that she (Mendez) was aware of the operation, knew what was in the suitcase and had already called "Shorti," who would be coming to the apartment soon to pick up the narcotics (136). Returning inside the apartment, the agents were directed by Mendez to the refrigerator in the kitchen, on which there was written the telephone number 435-1262. At this time the agents also observed nearby a scrap of paper on which there was also written the telephone number 435-1262 (136-137). At this point, Mendez was arrested.³

³ Mendez was also charged in the indictment, along with Morales, with possession of heroin with intent to distribute. Prior to trial, however, her case was severed from that of Morales, and on May 31, 1977, Judge Platt suppressed, as against her, evidence concerning the telephone number on the refrigerator and the slip of paper from the apartment and also inculpatory statements which she made to the agents in her apartment, which statements were not before the jury in Morales' trial.

"Shorti" was arrested but the complaint was subsequently dismissed.

Morales neither testified nor called any witnesses. As argued in summation (270-282), her defense was that she did not know the suitcase contained heroin.

A R G U M E N T

POINT I

Morales Was Not Denied A Fair Trial By The Court's Instructions On The Fabrication Of A Document And On Conscious Avoidance Of Knowledge.

Morales argues that she was denied a fair trial by the court's instructions on the fabrication of a document and on conscious avoidance of knowledge. We disagree.

A. The error in the court's instructions with respect to the use of a false name on the lost baggage report was harmless.

As noted above, when Morales arrived at LaGuardia Airport, she was unable to locate her suitcase, which had been temporarily held in Chicago by the DEA. As a result, she was required to have filled out by American Airlines a report of lost baggage. The information which Morales gave to the airline for this report was clearly false in that she stated that her name was "Carmen Ortiz." In this regard, Judge Platt charged the jury as follows:

There is evidence in this case, or at least the Government claims that there is evidence in this case, that the defendant participated in the fabrication of a document intended to mislead the investigative authorities. If you find beyond a reasonable doubt that this document was spurious or false, and if you find beyond a reasonable doubt

that the defendant participated in the making of it, you may consider that fact as probative of the defendant's guilt.

The fabrication of false documentary evidence has from the earliest time been treated as evidence of guilt. Similarly, if you find beyond a reasonable doubt that the defendant used a name other than her own in order to avoid subsequent identification, that would be a fact from which you may, but need not, if you do not wish to do so, infer a consciousness of guilt on her part (300-301).

Relying on *United States v. DiStefano*, 555 F.2d 1094, 1104 (2d Cir. 1977), Morales contends that the court committed reversible error by instructing the jury that it could consider the fabrication of a document (the lost baggage report) as probative of the defendant's guilt. We submit that the claim is without merit. Although the judge should have charged that fabrication of a document could be considered as evidence of "consciousness of guilt," *id.*; *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975), the error was harmless.

To begin with, no objection was made to the instruction at trial. Thus, reversal is only required if the erroneous charge constituted plain error affecting substantial rights of the accused. Rules 30, 52(b) Fed. R. Crim. P.; *United States v. Pelose*, 538 F.2d 41, 43 (2d Cir. 1976); *United States v. Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972). The error here was clearly harmless.

In the first place, it was the use by Morales of the name "Carmen Ortiz" which made the lost baggage report false. And, as seen above, Judge Platt immediately followed his incorrect instructions with a proper charge

that the use of a false name was a factor from which the jury could infer "a consciousness of guilt." Thus, the jury *was* properly instructed with regard to the use it could make of Morales' alias, the use of which on the lost baggage report resulted in the fabrication of the document. Just as importantly, however, there can be no doubt that, in the context of this trial, the erroneous instruction was virtually inconsequential. As both the defense and prosecution argued in summation (254-264, 271-282) and as Morales correctly points out in her brief (p. 3), the sole issue in this case was whether or not Morales knew that her suitcase contained narcotics. Nothing else was in dispute. This was the sole issue to be decided. Thus, when Judge Platt stated that the fabrication of a document could be considered as probative of guilt, he was, for all intents and purposes, telling the jury that it was probative of "a consciousness of guilt," because that was the only issue to be decided.

United States v. DiStefano, supra, is clearly distinguishable. There, this Court found plain error where, in a bank robbery trial, the judge incorrectly instructed the jury that false exculpatory statements by a defendant could be considered as "circumstantial evidence of the defendant's guilt." *United States v. DiStefano, supra*, 555 F.2d at 1104. In *DiStefano*, the evidence was extremely weak, establishing only that the defendant whom the prosecution said "cased" the bank associated with guilty parties, was present at the scene of the crime a few hours before the crime was committed, and entered the bank to change a dollar bill, "perhaps with some awareness that some illegal venture was contemplated by her companions". *Id.* Here, in contrast, the evidence was overwhelming, for the jury not only had before it Morales' transportation of the suitcase but also had her incredible and inherently unbelievable story about the mysterious "Juan".

B. The court's conscious avoidance charge was proper.

Morales also complains that the court gave erroneous instructions on conscious avoidance. In this regard, the jury was charged as follows:

The fact of knowledge may be sustained by direct or circumstantial evidence, just as any other fact in the case. One may not willfully and intentionally remain ignorant of a fact important and material to her conduct, and thereby, escape punishment. The defendant's lack of knowledge is not available to the defendant if the jury finds from all of the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid enlightenment by closing her eyes to the facts which should have caused her to investigate (301).

In addition, Judge Platt told the jury that an act was done knowingly if done voluntarily and intentionally and not because of mistake or accident or any other innocent reason (297, 299, 300).

Morales argues that the quoted charge was error "because it was not balanced by an instruction that if appellant actually believed that there were no drugs in the suitcase, then the jury must acquit." (Brief, p. 18). The contention is meritless. Judge Platt's instructions used language which has been consistently approved by this Court. *United States v. Dozier*, 522 F.2d 224 (2d Cir.), cert. denied, — U.S. —, 96 S.Ct. 461 (1975); *United States v. Joley*, 493 F.2d 672, 674 (2d Cir. 1974). The charge was entirely correct.

Morales' reliance on *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975), and *United States v. Esquez-Gomez*, 550 F.2d 1231, 1236 (9th Cir. 1977), a Ninth

Circuit case relying on *Bright*, is misplaced. The facts of *Bright* were different from those here. In *Bright*, a conviction for unlawful possession of stolen mail was reversed after the trial judge instructed the jury that it could find knowledge on the part of the defendant of the stolen character of the mail if it found that the defendant acted with "reckless disregard . . . or . . . conscious effort to avoid learning the truth . . .," and the court failed to explain to the jury the meaning of the term "reckless disregard" or to balance its instructions by telling the jury that it had to acquit if it found the defendant actually believed the mail was not stolen. The conscious avoidance charge in this case did not use the term "reckless disregard," was balanced by cautionary instructions that an act was only done knowingly if not done because of accident or mistake, and, as noted above, has been approved by this Court.

POINT II

Morales Was Not Deprived Of Effective Assistance Of Counsel.

Morales asserts that she was deprived of effective assistance of counsel. She bases the argument on the contention that her attorney was more concerned about his interests than her's, failed to object to improper evidence and, generally, poorly represented her at trial. We submit that the claim is without merit.

This Court has repeatedly stated that, in order for a claim of ineffective assistance of counsel to prevail in the Second Circuit, it must be shown that the representation of the defendant at trial was "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Li Puma v. Commissioner, Department of Corrections, State of New York*, — F.2d —,

Docket No. 77-2006, Slip Op. 4657, 4669-4670 (2d Cir. July 11, 1977); *United States v. Medico*, 557 F.2d 309, 318 (2d Cir. 1977). And, in this connection, it is well settled that "proof of the efficiency of such assistance lies in the character of the . . . proceedings . . ." *Wojtowicz v. United States*, 550 F.2d 786, 792 (2d Cir. 1977), quoting *United States v. Wight*, *supra*, 176 F.2d at 379. In other words, the quality of counsel's representation is to be judged by the way he performs at trial. We believe that, whether viewed through the *Wight* test or any other standard, *Rickenbacker v. Warden, Auburn Correctional Facility*, 550 F.2d 62, 65-66 (2d Cir. 1976), the record in this case demonstrates that Morales was effectively represented.⁴

Any evaluation of counsel's performance must, of course, begin with recognition of the fact that, as demonstrated by the Statement of Facts, the case against Morales was a strong one. In addition to being caught red-handed transporting two pounds of heroin from Chicago to New York, Morales further sealed her own

⁴ On appeal, Morales seeks to cloud the issue by giving considerable attention to certain incidents which occurred prior to trial before the selection of the jury. Thus, much is made of the fact that at the conclusion of the pre-trial suppression hearing proceedings on April 5, 1977, defense counsel was called to testify concerning a tape recording which, on cross examination, he suggested he made of a conversation he had on February 28, 1977 with Agent Whitmore (H. 191-199). Similarly, Morales points to an acrimonious exchange which took place between her lawyer and the prosecutor near the elevators outside the courtroom the day before the trial, as well as to certain statements by her lawyer on the day of the trial that he was "scared" about being reprimanded by the Appellate Division for impropriety in connection with the taping of the conversation with Agent Whitmore (4-12).

The fact is that apart from providing a lurid backdrop on appeal for the inadequacy of counsel claim, these incidents have no bearing on a determination of the effectiveness of the representation which Morales received at trial.

fate by giving an incredible and unbelievable explanation to the authorities. She told the bizarre story of "Juan" or "El Chiquito," the man whom she had met only once or twice, who came mysteriously tapping at her door and asked her to take the suitcase to New York.

Nevertheless, though burdened with a bad set of facts, Morales' attorney exerted all possible efforts in her defense. Thus, after engaging in pre-trial discovery, he sought to have suppressed both the narcotics from the suitcase and the post-arrest statements made by Morales on February 25th (H. 6). With regard to the narcotics, since the search which revealed the heroin had not been conducted by, or at the behest of, the government, there was little that could be done to keep the evidence of the drugs from being introduced. This fact notwithstanding, counsel cross-examined both Sherry Lynn Grey and Deborah Carvatta, the American Airlines employees, to try and establish some basis for mounting an effective argument in support of suppression (H. 33-42, 74-95). Likewise, Morales' attorney cross-examined Agents Whitmore and Lawry to challenge the voluntariness of the statements which his client made after her arrest (H. 116-127, 129-131, 173-185).

Counsel continued his efforts at trial. Clearly recognizing that the only issue in the case was the defendant's state of mind, he attempted to make the best use possible of the damning post-arrest statement by seeking to elicit testimony on cross-examination which would amplify and explain the statement and thus make it more credible. Thus, counsel inquired as to whether Morales had stated to the agents that she accepted the offer from "Juan" because, as "Juan" knew, she was unemployed and had a sister in New York (143, 145-146). Also, the attorney emphasized the exculpatory aspects of the statement (157-158, 231, 239) and continued to probe on the issue of its voluntariness (226-236). In addition, counsel sought to

arouse the sympathy of the jury for Morales by dwelling on her initial cooperation with the agents (158-166), the heavy possible maximum sentence she faced (172-173, 215), the fact that she was unemployed and had children (143, 145-146), and her fears for her safety and that of her family (166-177, 215-216). Moreover, in summation, counsel argued forcefully and, indeed, as best he could in view of the evidence, that his client had no knowledge of the heroin in the suitcase (270-282).

Essentially, appellate counsel's attack on the quality of the trial representation in this case amounts to little more than an exercise in nitpicking and second guessing through hindsight. First of all, as just demonstrated, it can hardly be argued that Morales' attorney was more concerned with his own interests than those of his client, for, as we have shown, he effectively represented her.⁵

Also to be rejected are the various arguments on appeal about things which counsel should or should not have done. Morales complains, for example, about the alleged admission of a statement by Anna Mendez which was later suppressed and about testimony from Officer Lawry concerning a post-arrest statement by Morales that "Juan" told her to use the name "Carmen Ortiz" (212-213), the claim being that Morales was not told about this latter statement in pre-trial discovery. Both points are frivolous. The fact is that the statement of

⁵ The contention that the lawyer was more concerned about his own interests than Morales' appears to be based on the fact that when discussing the possibility of his testifying at trial concerning his telephone conversation with Agent Whitmore, the lawyer said that, as a witness, he would have to look out for his own interests and that he would thus not be able to continue to represent Morales (4-12.) Apart from the fact that counsel thus showed that he realized he could not be both a witness and an advocate, the problem never materialized because no need arose for the lawyer to testify at the trial.

Mendez which was later suppressed (H. 106-108) was *not* before the jury at Morales' trial. Rather, at trial, Agent Whitmore simply described his finding the telephone number 435-1262 on the refrigerator in the Mendez apartment, along with a slip of paper with the same number on it (137-138). Concerning testimony about Morales' statement that "Juan" told her to use the name "Carmen Ortiz," it need only be noted that counsel did move for a mistrial when this statement was admitted (212-213). More significantly, though, the statement had little or no importance at the trial. What was relevant was Morales' use of a false name, not who told her to use that name.

Nor need we tarry long over claims concerning defense counsel's summation and the failure to object to certain questions and statements by the prosecutor. Thus, appellate counsel would have this Court conclude that Morales was convicted because of her lawyer's off-hand suggestion in closing argument (273, 281) that Morales may have believed the suitcase contained marijuana instead of heroin. This is absurd. Quite simply, there was never any suggestion at trial that Morales believed there was marijuana in her bag. The whole thrust of her defense was that she did not know that the suitcase contained *any* narcotics. Likewise, we can find nothing to criticize in counsel's decision to stipulate to all but the testimony of Agent Whitmore and Officer Lawry. The only issue at trial was whether Morales knew the true contents of the suitcase. In addition to saving the time of the court, counsel could well, and with good reason, have believed that there was little to be gained for his client by having witnesses testify about the details of the circumstances surrounding the purchase of the ticket to New York, the discovery of the heroin, the filing of the claim for lost baggage and the laboratory analysis of the contents of the bag. Finally, the instances of allegedly improper questions and remarks by the prosecutor were,

in the context of this trial, so inconsequential as to hardly even merit comment.⁶

In short, counsel on appeal has done little more than establish that he would have tried the case differently. This may well be. The fact is, however, that differing views over trial tactics and strategy do not amount to grounds for reversal, *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963), especially where, as here, the record shows that the defendant was well represented.

POINT III

Morales Was Properly Sentenced.

As her final claim on appeal, Morales contends that her sentence should be vacated. Specifically, she argues that sentence was imposed on the basis of false assumptions because Judge Platt allegedly misunderstood the full extent of her cooperation with the DEA.

This Court has recently reaffirmed the well-settled principle that sentencing is a matter totally within the discretion of the trial judge and that, generally, a sentence which is within statutory limits is not subject to appellate review. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (1977);

⁶ We find nothing excessive in the Assistant United States Attorney's reference in summation to the heroin as "contraband poison." (260). Similarly, what on appeal is termed "an impromptu mid-trial speech to the jury" by the prosecutor was actually nothing more than the noting that slips of paper taken from Anna Mendez' apartment bore the same telephone number as appeared on papers taken from Morales at the time of her arrest (138-139).

United States v. Stein, 544 F.2d 96, 101 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976). In this regard, we need only note that the sentence here—12 years imprisonment and a special parole term of 10 years—was well within the statutory limit.

Nevertheless, where it can be shown that there is a possibility that sentence was imposed on the basis of incorrect information or false assumptions concerning the defendant, an appeal will lie and the sentence will be vacated. *United States v. Robin*, *supra*, 545 F.2d at 779; *United States v. Stein*, *supra*, 544 F.2d at 101. As noted, it is upon this general principle that Morales relies when she argues that Judge Platt was under a misapprehension as to her cooperation. Because there is no factual support for it in the record, however, we believe that the contention is totally without merit.

The whole premise for Morales' argument is the assertion that Judge Platt both ignored and misunderstood the extent of her initial cooperation with the agents. However, this is simply not so. After defense counsel stressed Morales' assistance to the agents and argued for leniency on behalf of his client (S. 5-7), the court responded by noting that Morales had not *fully* cooperated by testifying at trial (S. 7-8). The judge then made it crystal clear that he was aware of the facts of the case and that he had taken all relevant matters into consideration:

Mr. Lieber, I'm aware of the extent of the cooperation that your client gave. I'm also aware of the cooperation that she has not given. I have also heard all the facts brought out at the trial. . . . (S. 10).

Thus, contrary to the assertion on appeal, Judge Platt was both aware of, and understood, the extent of the

cooperation given by Morales. The sentencing claim must fail.⁷

CONCLUSION

The judgment of conviction should be affirmed.

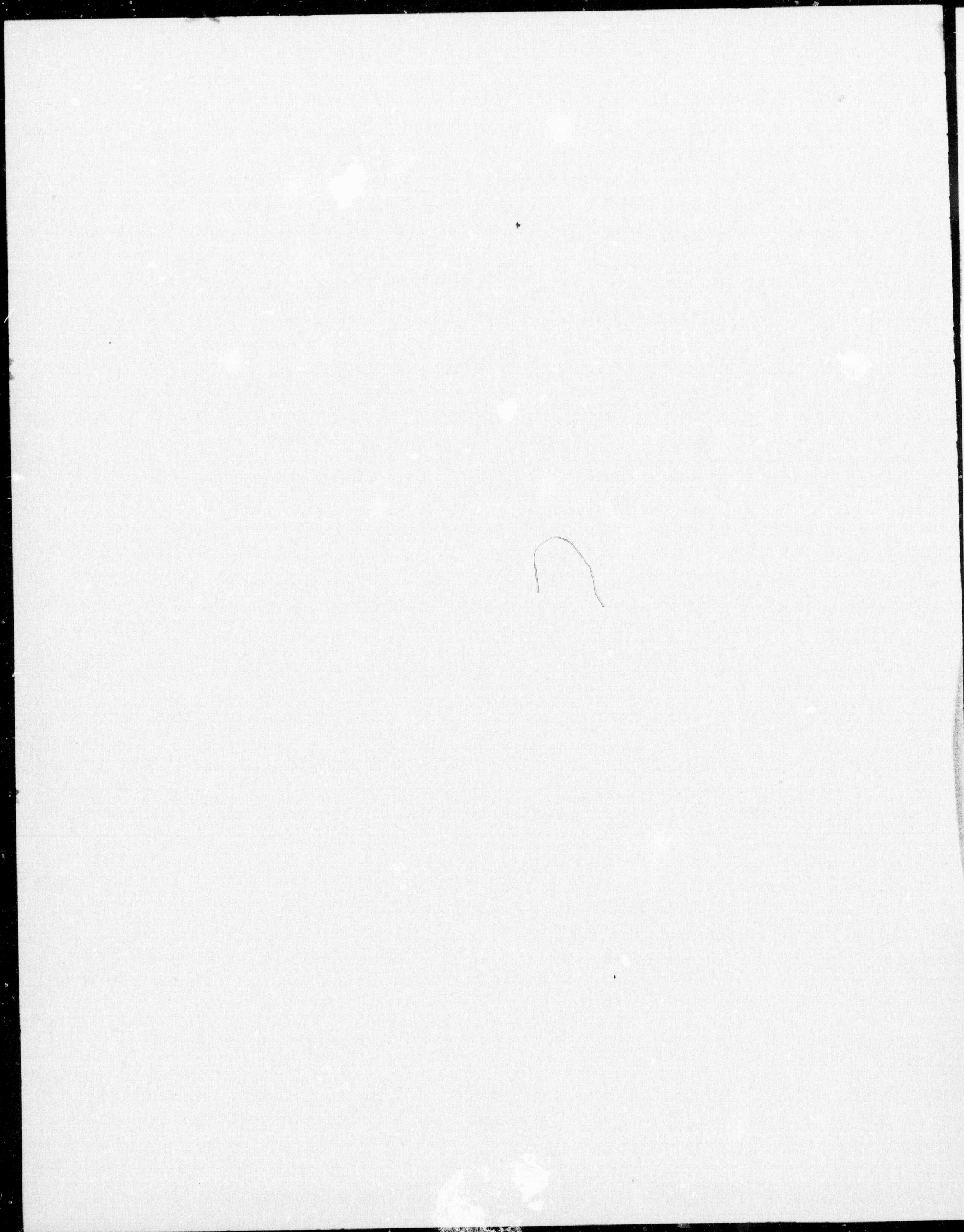
Dated: Brooklyn, New York
October 12, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
(Of Counsel).

⁷ Lastly, although it is true that the court did not permit any friends of Morales to speak at her sentencing, the judge did state that defense counsel could speak in behalf of people who were familiar with Morales' character and family background and who wished to be heard (S. 9).



AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

_____ KELVIN OUTLAW _____ being duly sworn,
deposes and says that he is employed in the office of _____ U. S. Attorney
_____ United States Attorney for
the Eastern District of New York, attorney for the _____ appellee
herein.

That on the 14th day of October 19 77, he did serve a true copy of
the hereto annexed _____ BRIEF FOR THE APPELLEE

_____ on the office of Martin Erdmann, Esq., Legal Aid Society
attorney for the _____ appellant _____ herein, located at 509 U. S.
Courthouse, Foley Square,
Borough of New York _____, City of New York, by leaving a true copy of the same with
the person in charge of said office, there being no one present who was authorized to give an admis-
sion of service.

Kelvin Outlaw

Sworn to before me this

14th day of October 19 77

Barbara Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1978

Sir:

Court Index No.

You will please take notice that a _____
of which the within is copy, was this day
duly entered in the within entitled action,
in the office of the Clerk of this Court.

Dated, Brooklyn, New York _____ 19_____

Yours, etc.,

United States Attorney,

Attorney for _____

To

Attorney for _____

Sir:

Please take notice that the within _____
will be presented for settlement and signa-
ture to the Honorable _____
at the office of the clerk, _____

Borough of _____ City of
New York, on the _____ day of _____,
19 _____, at _____ o'clock in the _____ noon,
or as soon thereafter as counsel can be
heard.

Dated, Brooklyn, New York _____ 19_____

Yours, etc.,

United States Attorney,

Attorney for _____

To

Attorney for _____

United States Attorney,
Attorney for _____

Due service of a copy of the within is
hereby admitted.
New York, _____, 19 _____

Attorney for _____

To

Attorney for _____

Form No.

